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# International Law--Actions Against Sovereign or Instrumentality

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**INTERNATIONAL LAW—ACTIONS AGAINST SOVEREIGN OR INSTRUMENTALITY—Foreign Sovereign Immunities Act of 1976 Provides the Sole Basis for Obtaining Jurisdiction Over Foreign States in United States Courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).**

**I. INTRODUCTION**

On April 12, 1982, the Argentine Republic invaded the British colony off the eastern coast of Argentina known as the Falkland Islands, and war between the two countries ensued.<sup>1</sup> On June 8, 1982, without any provocation or warning, Argentine military aircraft bombed the *Hercules*, a Liberian owned crude oil tanker, while the ship was in international waters outside the war zone designated by the two belligerents. The tanker suffered extensive damage and was finally scuttled off the Brazilian coast.<sup>2</sup> After unsuccessful attempts to pursue their damage claims in Argentina, the Liberian owner and charterer of *Hercules* brought suit against the Argentine Republic in the Southern District of New York.<sup>3</sup> The district court dismissed

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<sup>1</sup> The Falkland Islands are known as Malvinas to the Spanish-speaking world. For a historical account of the Falkland War, see Freedman, *The War of the Falkland Islands, 1968*, 61 FOREIGN AFF. 196 (1982).

<sup>2</sup> *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73, 74 (S.D.N.Y. 1986), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989). The *Hercules* was owned by United Carriers, Inc. and chartered by Amerada Hess Shipping Corporation, both Liberian corporations, for transport of crude oil from Alaska to the Virgin Islands. Because the tanker was too wide to pass through the locks of the Panama Canal, the *Hercules* sailed between the two destinations by travelling around the southern tip of South America at Cape Horn. The bombing caused extensive damage to the decks and hull of the *Hercules*, and an undetonated bomb was lodged in her starboard side. Following an assessment by the Brazilian navy, United Carriers decided that it would be too risky to remove the bomb and repair the ship. Accordingly, the *Hercules* was sunk 250 miles off the coast of Brazil. *Id.*

<sup>3</sup> *Id.* United Carriers claimed damages of \$10,000,000 for the loss of the ship and Amerada Hess claimed a loss of \$1,901,259.07 on the fuel that went down

the complaint for lack of subject matter jurisdiction<sup>4</sup> under the Foreign Sovereign Immunities Act (FSIA).<sup>5</sup>

On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed and remanded, holding that the FSIA did not preempt a grant of jurisdiction under the Alien Tort Statute<sup>6</sup> (ATS) which allowed an alien to sue a foreign state in the United States courts for torts committed in violation of international law.<sup>7</sup> Since the bombing of a neutral merchant vessel outside the designated war zone clearly constituted a violation of international law, the Second Circuit concluded that federal courts could assert jurisdiction over the case pursuant to the ATS.<sup>8</sup> The Supreme Court granted certi-

with the tanker. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

<sup>4</sup> *Amerada Hess*, 638 F. Supp. at 77. The court held that the Foreign Sovereign Immunities Act (FSIA) did not repeal the Alien Tort Statute (ATS) but only narrowed the class of defendants under the ATS to non-sovereign state entities. *Id.* at 76. The district court was adamant that the FSIA remained the exclusive basis for asserting jurisdiction over a sovereign state: "A foreign state is subject to jurisdiction in the courts of this nation *if, and only if*, an FSIA exception empowers the court to hear the case." *Id.* at 75 (emphasis added). Since plaintiff's claims fell outside the exceptions to the blanket immunity accorded to a foreign state by the FSIA, the court granted Argentina's motion to dismiss. *Id.* at 77. For a discussion of the FSIA and the ATS, see *infra* notes 11-103 and accompanying text.

<sup>5</sup> 28 U.S.C. §§ 1330, 1602-1611 (1988).

<sup>6</sup> 28 U.S.C. § 1350 (1988).

<sup>7</sup> *Amerada Hess*, 830 F.2d at 422-23.

<sup>8</sup> *Id.* at 423-26. With respect to the relation between the FSIA and ATS, the court concluded that given the emphasis on commercial concerns in enacting the FSIA and the absence of any explicit indications in the legislative history that the FSIA preempted ATS in cases where foreign sovereigns were sued, the FSIA did not preempt the jurisdiction of ATS in this case. *Id.* at 426-27. The dissenting opinion asserted that "the plain language of this provision (§ 1602 of the FSIA) means that the FSIA established the exclusive framework within which the courts of the United States were, from 1976 onward, to rule on foreign states' claims of sovereign immunity." *Id.* at 430 (Kerane, J., dissenting). Agreeing with the district court, Judge Kearse found that since the present case did not fall within any exceptions under FSIA, the case should be dismissed for want of subject matter jurisdiction. *Id.* at 431.

The Second Circuit decision in *Amerada Hess* quickly drew adverse comments. Commentators criticized the court for ignoring clear legislative intent to make FSIA the exclusive basis of jurisdiction over foreign states. Note, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 845 (1988) [hereinafter Note, 72 MINN. L. REV.]. For other criticisms, see DiBiagio, *Federal Jurisdiction over Foreign Governments for*

orari<sup>9</sup> and rendered a unanimous decision in *Argentine Republic v. Amerada Hess Shipping Corp.* (*Amerada Hess*).<sup>10</sup> Held, Reversed: the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in United States courts, and the district court correctly dismissed the action because the FSIA did not authorize jurisdiction over the Argentine Republic under the facts of this case.<sup>11</sup>

## II. LEGAL BACKGROUND

The Supreme Court's decision in *Amerada Hess* is important in that it unequivocally declares the preemptive nature of the FSIA in relation to the ATS. A brief survey of the FSIA and ATS is therefore essential to the understanding of the legal context surrounding the decision.

### A. Foreign Sovereign Immunities Act

The notion of sovereign immunity provides exemption to a sovereign state from the jurisdiction of the courts of other nations.<sup>12</sup> The concept historically originated from an era in which monarchical power was inviolable<sup>13</sup> and

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*Violation of International Law: Foreign Sovereign Immunity and the Alien Tort Statute after Amerada Hess Shipping Corp. v. Argentine Republic*, 12 MD. J. INT'L L. & TRADE 153, 155 (1988) (by ruling that the Argentine armed forces violated international law and therefore was subject to civil liability in a United States federal court, the Second Circuit arbitrarily interfered with the constitutional duty of the executive in formulating the tenor of American diplomatic relations); Note, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violation of the Preemptory Norms of International Law*, 77 CALIF. L. REV. 365, 373 n.46 (1989) [hereinafter Note, 77 CALIF. L. REV.] (the Second Circuit's decision permits an inequitable result in that a foreign alien is allowed to bring a tort action against a foreign sovereign in United States courts but similar remedy is not available to a United States citizen because only an alien may invoke the ATS); Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1131 (1988) [hereinafter Note, 39 HASTINGS L.J.] ("[T]he Second Circuit's decision was apparently designed to circumvent the clear language of the FSIA. . . . [T]he court attempted to justify a preconceived decision to assert subject matter jurisdiction over the case").

<sup>9</sup> 485 U.S. 1005 (1988).

<sup>10</sup> 488 U.S. 428 (1989).

<sup>11</sup> *Id.* at 443.

<sup>12</sup> T. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* 1 (1970).

<sup>13</sup> *Id.* at 7.

the sovereign could do no wrong.<sup>14</sup> The exercise of authority by one sovereign over another would naturally be considered inappropriate and represented an act of hostility.<sup>15</sup> The principle gradually developed into a norm of international law,<sup>16</sup> and two schools of thought have emerged to provide justifications for the immunity concept. One theory holds that sovereign immunity is based on the mutual equality and independence of states.<sup>17</sup> Immunity is seen as a fundamental right inseparable from the dignity and independence of a sovereign state.<sup>18</sup> Another theory contends that the granting of immunity by one sovereign state to another is premised upon the notion of international comity,<sup>19</sup> motivated by the "desire to promote good will and reciprocal courtesies among nations."<sup>20</sup>

The doctrine of sovereign immunity was first pronounced in the United States by Supreme Court Chief Justice John Marshall in the landmark case of *The Schooner Exchange v. M'Faddon*.<sup>21</sup> The case represented the judicial adoption of the absolute sovereign immunity principle in the United States.<sup>22</sup> Under this principle a foreign state

<sup>14</sup> R. LILlich, *THE PROTECTION OF FOREIGN INVESTMENT* 1 (1965).

<sup>15</sup> T. GIUTTARI, *supra* note 12, at 7.

<sup>16</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 introductory note (1988) [hereinafter RESTATEMENT] ("The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law").

<sup>17</sup> E. ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS* 4 (1983); see also L. OPPENHEIM, *INTERNATIONAL LAW* 266-67 (1955).

<sup>18</sup> See Note, 72 MINN. L. REV., *supra* note 8, at 832; see also Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 476 (1980).

<sup>19</sup> Angell, *Sovereign Immunity—The Modern Trend* 35 YALE L.J. 150, 152-153 (1925); see also Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. OF TRANSNAT'L L. 1, 2 (1986).

<sup>20</sup> T. GIUTTARI, *supra* note 12, at 6; see also Cardozo, *Judicial Deference To State Department Suggestions: Recognition of Preogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461, 468-69 (1963).

<sup>21</sup> 11 U.S. (7 Cranch) 116 (1812). In granting sovereign immunity to France in a suit for possession of a schooner, Chief Justice Marshall declared that sovereign immunity was not based on a rule of law, but on the concept of grace and comity. *Id.* at 136.

<sup>22</sup> T. GIUTTARI, *supra* note 12, at 8.

cannot be sued or impleaded in the courts of other countries without its consent.<sup>23</sup> Absolute sovereign immunity prevailed in the United States until the early 1950s.<sup>24</sup> The doctrine began to draw criticism during the late 19th and early 20th centuries, and this attack gathered extra momentum in the post World War I era. In an effort to reorganize their war-shattered economies, national governments began to adopt a more active role in the business and economic affairs of the nations. As business transactions between national governments and private parties increased, so did disputes and litigation.<sup>25</sup> Critics deplored the absolute immunity doctrine as producing inequitable results because private parties' claims were often dismissed regardless of the merits of their cases. Some commentators blamed the absolute immunity doctrine for distorting the operation of the market by transferring the risk of doing business from the government to the private party. To maintain the proper function of a market economy, it became necessary to restrict the scope of sovereign immunity.<sup>26</sup>

Advocates of a restrictive version of sovereign immunity finally won the support of the United States Government in 1952. In that year, the State Department declared its adoption of the restrictive sovereign immunity theory in the famous Tate Letter.<sup>27</sup> Under this theory, a foreign state enjoys immunity only with respect to claims arising out of its public acts; it is not immune from claims concerning activities that a private person could perform, notably commercial or business activities.<sup>28</sup> The restrictive immunity theory has since become the governing doctrine in the United States.

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<sup>23</sup> P. SHEPARD, SOVEREIGNTY AND STATE-OWNED COMMERCIAL ENTITIES 5-6 (1951).

<sup>24</sup> DiBiagio, *supra* note 8, at 156-57.

<sup>25</sup> T. GUITTARI, *supra* note 12, at 63-84.

<sup>26</sup> Note, 77 CALIF. L. REV., *supra* note 8, at 379-80.

<sup>27</sup> Letter from Jack Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984-85 (1952).

<sup>28</sup> RESTATEMENT, *supra* note 16, § 451 comment a.

Traditionally, the State Department would provide written suggestions to the judiciary on the question of whether foreign sovereign immunity should be granted in a particular case.<sup>29</sup> Such suggestions were initially advisory in nature, but in a series of cases in the 1930s and 40s, the Supreme Court declared that the advice of the executive branch should be taken as conclusive determinations by the court without independent judicial inquiry.<sup>30</sup> That high degree of deference is based upon the notion of separation of powers and the recognition that foreign relations is one of the constitutional prerogatives vested in the executive branch.<sup>31</sup> Executive determination of immunity was highly politicized, however, and jurisdiction was often denied or granted on nonlegal grounds, such as the strength of diplomatic pressure a foreign government could exert on the State Department.<sup>32</sup> To make matters worse, the State Department was not the only authority from which foreign state defendants could request immunity. The defendants could bypass the executive branch and go directly to the courts. In such case, the responsibility of determining immunity requests rested solely with the judiciary. Hence, sovereign immunity determinations were made by two independent branches of the government, each using different criteria in making its decision.<sup>33</sup> The dual decision-making process not only

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<sup>29</sup> *Ex Parte Muir*, 254 U.S. 522, 532-33 (1921).

<sup>30</sup> See *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *Ex Parte Peru*, 318 U.S. 578, 589 (1943) (State Department's certification of the immunity of a foreign vessel will be taken as conclusive determination that continued retention of the vessel interferes with the proper conduct of the country's foreign relations. Upon submission of the certificate to the court, it is the duty of the court to release the vessel and dismiss the case); *Compania Espanola de Navegacion Maritima v. Navemar*, 303 U.S. 68, 74 (1938) (if the claim of sovereign immunity is recognized and allowed by the executive branch of the government, it is the duty of the courts to release the foreign vessels under detention).

<sup>31</sup> See Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. OF TRANSNAT'L L. 19, 20 (1986); see also Cardozo, *supra* note 20, at 468-72.

<sup>32</sup> Note, 77 CALIF. L. REV., *supra* note 8, at 369.

<sup>33</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983).

produced inconsistent and unpredictable results,<sup>34</sup> but also encouraged the foreign state defendants to forum shop between the judiciary and the State Department.<sup>35</sup> Moreover, even if a plaintiff could secure a judgment against a foreign state, the chance of successfully recovering damages was extremely small because the courts still followed the absolute immunity doctrine in the execution of judgments.<sup>36</sup> It was against this confusing state of affairs that the Foreign Sovereign Immunities Act (FSIA)<sup>37</sup> was enacted.

When the Congress enacted the FSIA in 1976, the United States became the first sovereign state to codify the law of foreign sovereign immunity in a statute.<sup>38</sup> The Act accomplishes four basic objectives. First, it codifies the restrictive theory of sovereign immunity, thereby providing a uniform judicial standard for all parties to follow.<sup>39</sup> Second, the FSIA transfers the responsibility for determining questions of sovereign immunity from the State Department to the courts.<sup>40</sup> The shift ensures that immunity questions are judged on purely legal grounds and that the procedure comports with the requirements of due process.<sup>41</sup> Ending executive domination in this area would eliminate the previous haphazard and inconsistent decision-making and depoliticize the whole process of immunity determination.<sup>42</sup> Third, the Act provides a comprehensive procedural framework for obtaining subject

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<sup>34</sup> See Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUDIES IN WORLD PUB. ORD. 1, 11-13, 15-17 (1976).

<sup>35</sup> *Id.* at 11.

<sup>36</sup> See Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP.L.Q. 302, 304 (1986).

<sup>37</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-1611 (1988)).

<sup>38</sup> Feldman, *supra* note 31, at 19.

<sup>39</sup> See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605 [hereinafter HOUSE REPORT].

<sup>40</sup> See 28 U.S.C. § 1602 (1988).

<sup>41</sup> HOUSE REPORT, *supra* note 39, at 6606.

<sup>42</sup> Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891, 18 HARV. INT'L L.J. 429, 436 (1977).



matter and personal jurisdiction over a foreign state and creates related statutory procedure for making service.<sup>43</sup> Fourth, the statute modifies the application of absolute sovereign immunity theory in the execution of a judgment and allows the plaintiff, under certain conditions, to attach property of a foreign state located in the United States to satisfy the judgment.<sup>44</sup>

As a general rule, a foreign state is immune from the jurisdiction of courts of the United States under the FSIA.<sup>45</sup> This blanket grant of immunity is subject to a list of exceptions, mainly concerning commercial or private activities of the foreign state.<sup>46</sup> Specifically, the exception applies where: (1) a foreign state has waived its immunity;<sup>47</sup> (2) the action is based upon or related to a commercial activity carried on by the foreign state;<sup>48</sup> (3) rights in property are taken in violation of international law;<sup>49</sup> (4) rights in property in the United States acquired by succession or gifts are involved;<sup>50</sup> (5) the action concerns certain noncommercial torts within the United States;<sup>51</sup> (6) a maritime lien based upon commercial activity of a foreign state is involved;<sup>52</sup> or (7) the action involves certain counterclaims.<sup>53</sup> Significantly, the FSIA provides no general exception to immunity based on violations of international law other than when property is taken in violation of such law.

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<sup>43</sup> 28 U.S.C. § 1330(a), (b); HOUSE REPORT, *supra* note 39, at 6606.

<sup>44</sup> 28 U.S.C. § 1610; HOUSE REPORT, *supra* note 39, at 6606.

<sup>45</sup> 28 U.S.C. § 1604 (1988). The broad grant of immunity is subject to existing international agreements to which the United States was a party at the time of the enactment of the FSIA. *Id.*

<sup>46</sup> 28 U.S.C. §§ 1605, 1607, (1988).

<sup>47</sup> *Id.* § 1605(a)(1).

<sup>48</sup> *Id.* § 1605(a)(2).

<sup>49</sup> *Id.* § 1605(a)(3).

<sup>50</sup> *Id.* § 1605(a)(4).

<sup>51</sup> *Id.* § 1605(a)(5).

<sup>52</sup> *Id.* § 1605(b).

<sup>53</sup> 28 U.S.C. § 1607 (1988).

## B. *Alien Tort Statute*

The Alien Tort Statute (ATS), enacted as part of the First Judiciary Act of 1789,<sup>54</sup> provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>55</sup>

The ATS has been described by Judge Friendly as a "legal Lohengrin" because "no one seems to know whence it came."<sup>56</sup> The rationale for enacting the statute remains largely unknown as no direct or indirect legislative history exists.<sup>57</sup> Commentators have theorized that the Congress had three particular purposes in mind when it passed the ATS. First, the newly formed federal government believed that cases involving foreign nationals would inevitably affect the country's foreign relations, hence the federal government should exercise control over such suits.<sup>58</sup> Second, before the enactment of ATS, suits brought by foreigners were heard by state courts. To achieve uniformity in dealing with cases that had international implications, Congress believed that it was necessary to transfer jurisdiction from the state judiciary to federal courts.<sup>59</sup> Third, the newly formed federal government was anxious to gain international acceptance. The ATS was enacted as a gesture of comity whereby nationals of foreign countries were given an exclusive grievance re-

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<sup>54</sup> See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1845).

<sup>55</sup> 28 U.S.C. § 1350 (1988).

<sup>56</sup> *IIT, an International Investment Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The title character of a Wagner opera, "Lohengrin" is a shadowy figure who appears mystically to rescue a maiden and then vanishes as quickly as he has come.

<sup>57</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D. C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). There was no discussion of the Alien Tort Statute in the House debates over the Judiciary Act of 1789 and the Senate debates over the same Act were not recorded. *Id.*

<sup>58</sup> See Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 19-20 (1985).

<sup>59</sup> See Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 133-34 (1986). See also Randall, *supra* note 58, at 21 (promoter of ATS considered state courts parochial in nature and more likely to deny justice to foreign nationals).

dressing mechanism not previously available.<sup>60</sup>

The ATS provides that only an alien can invoke jurisdiction. A United States citizen cannot bring suit under the ATS but can be sued by an alien under the statute's provisions.<sup>61</sup> The ATS has not clearly defined the class of defendants, but plaintiffs have brought suits under the statute against foreign states,<sup>62</sup> business corporations,<sup>63</sup> and individuals.<sup>64</sup> The obscure language of the Act has created considerable uncertainty as to the meaning of "violation of the law of the nations" and "tort only."<sup>65</sup>

The ATS has been in the statute books for more than 200 years. The statute, however, is rarely invoked,<sup>66</sup> in part due to its obscure origin and cryptic language. To date, federal courts have sustained jurisdiction under the ATS in only three cases. The first successful invocation of ATS was in *Bolchos v. Darrel*.<sup>67</sup> In this case, the district court of South Carolina sustained jurisdiction over an action involving the interpretation of a treaty between the United States and France to determine the status of slaves

<sup>60</sup> See Randall, *supra* note 58, at 20-22.

<sup>61</sup> 28 U.S.C. § 1350. Judge Bork suggested in *Tel-Oren* that the ATS was specifically intended to protect foreign ambassador plaintiffs. 726 F.2d at 813-14 (Bork, J., concurring). The statute in its final form was, however, drafted in general catchall language which permits any alien to invoke jurisdiction. See Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 499 (1986).

<sup>62</sup> See e.g., *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990) (relatives of a Swedish diplomat sued the USSR for wrongful imprisonment and possible death of the diplomat).

<sup>63</sup> See e.g., *IIT*, 519 F.2d at 1001 (Luxemburg investment trust sued a Bahamian corporation for fraud, conversion, and corporate waste).

<sup>64</sup> See e.g., *Cohen v. Hartman*, 490 F. Supp. 517 (S.D. Fla. 1980), *aff'd per curiam* 634 F.2d 318 (5th Cir. Unit B Jan. 1981) (a Canadian employer sued his employee, also a Canadian, for embezzlement allegedly committed within the United States).

<sup>65</sup> Note, 72 MINN. L. REV., *supra* note 8, at 839. For the language of the Act, see *supra* note 54 and accompanying text.

<sup>66</sup> See Comment, *Foreign Sovereign Immunity After Amerada Hess Shipping Corp. v. Argentine Republic: Did It Go Down with the Hercules?*, 11 FORDHAM INT'L L.J. 660, 673 (1988). In the two hundred year existence of ATS, there have been around forty reported cases brought under the statute. *Id.*

<sup>67</sup> 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

aboard a captured Spanish warship.<sup>68</sup> After a long period of dormancy, the district court of Maryland in 1961 granted jurisdiction again under ATS in *Abdul-Rahman Omar Adra v. Clift*.<sup>69</sup> In that case, the court sustained jurisdiction over a child custody action by a Lebanese national against his former wife. The court found that falsification of the wife's passport to conceal the child's nationality was a violation of the law of nations, and the wife had committed a tort by removing the child from her father's custody.<sup>70</sup>

A more recent and celebrated use of the ATS as a basis for jurisdiction was in *Filartiga v. Pena-Irala*.<sup>71</sup> In *Filartiga*, a Paraguayan physician plaintiff sued a former Paraguayan police official for the alleged torture and death of the physician's son. The main issue was whether torture under color of state authority constituted a violation of the law of the nations.<sup>72</sup> The district court dismissed the case on the grounds that a government's treatment of its own subjects was not within the scope of customary international law.<sup>73</sup> The Second Circuit reversed and found that jurisdiction was proper under the ATS. The court explained that an action brought under the ATS must assert a wrongful act uniformly accepted as a violation of international law.<sup>74</sup> In the court's view, the "law of nations" must be interpreted not as it was in 1789, but as it has developed and exists in the modern world.<sup>75</sup> Holding that official torture of an individual constituted a clear and unambiguous violation of international law,<sup>76</sup> the Second Circuit granted jurisdiction.

*Filartiga* is important in two respects. First, the Second

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<sup>68</sup> *Id.* at 810.

<sup>69</sup> 195 F. Supp. 857 (D. Md. 1961).

<sup>70</sup> *Id.* at 862-65.

<sup>71</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>72</sup> *Id.* at 880.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 881.

<sup>76</sup> *Id.* at 878.

Circuit injected new life into the centuries old statute by applying it to an international human rights claim. This novel use of the statute was quickly applauded by human rights proponents.<sup>77</sup> Furthermore, the statute is regarded as a powerful force enabling the United States courts to take an active role in vindicating human rights in the international arena.<sup>78</sup> Second, the *Filartiga* court interpreted the term "law of nations" as referring to contemporary norms of international law rather than those existing at the time the ATS was enacted. By recognizing that international law was a body of evolving principles, the court established a wider and more flexible basis for invoking ATS. This expansive reading of the statute serves as the "intellectual precursor" of the Second Circuit opinion in *Amerada Hess*.<sup>79</sup>

While the *Filartiga* court expanded the scope of ATS jurisdiction, the District of Columbia Circuit in *Tel-Oren v. Libyan Arab Republic*<sup>80</sup> adopted a much narrower analysis. In *Tel-Oren*, Israeli plaintiffs brought suit against Libya and the Palestinian Liberation Organization for claims arising out of a terrorist attack in Israel. The court of appeals dismissed the action in a unanimous decision, but three concurring opinions were issued. These opinions reflect the absence of agreement as to what constitutes a violation of "the law of nations" for the purpose of asserting jurisdiction under the ATS.

Judge Edwards, in his concurring opinion, stated that

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<sup>77</sup> Casto, *supra* note 61, at 470; see also Note, *Enforcement of International Human Rights in the Federal Courts After Filartiga v. Pena-Irala*, 67 VA. L. REV. 1379, 1393 (1981) (federal courts have an obligation to hear international human rights disputes when jurisdiction is provided by the ATS); Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353, 368 (1981) (*Filartiga* holding is an important advance in human rights law).

<sup>78</sup> See Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Power*, 74 GEORGETOWN L.J. 163 (1985); Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. MARSHALL L. REV. 341 (1988).

<sup>79</sup> See Note, *Amerada Hess and Foreign Sovereign Immunity: The Conflict Between the Foreign Sovereign Immunities Act and the Alien Tort Claims Act in Establishing Jurisdiction Over the Extraterritorial Torts of Foreign States*, 24 STAN. J. OF INT'L L. 585, 591 (1988).

<sup>80</sup> 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

ATS could be invoked when there was a tortious violation of a principle of international law on which the community of nations had reached a consensus.<sup>81</sup> Since there was no common understanding as to what constituted international terrorism, no basis existed to assert jurisdiction on the ground of a violation of international law under ATS.<sup>82</sup> Judge Robb concurred in the dismissal on the ground that the case was a nonjusticiable political question and he warned against judicial interference into politically sensitive areas, such as international terrorism, which had traditionally been the domain of the executive and legislative branches.<sup>83</sup> Judge Bork wrote the most controversial of the three opinions. He adopted a very restrictive reading of the statute and reasoned that jurisdiction of the ATS was limited to those violations of international law that were recognized as actionable in 1789.<sup>84</sup> Since international terrorism was unknown at the time of the ATS' enactment, jurisdiction could not be sustained.<sup>85</sup> The divergent opinions in *Tel-Oren* demonstrate the degree of uncertainty affecting the jurisdictional analysis of the ATS.

### C. *Interplay Between FSIA and ATS*

Notwithstanding that fact that *Tel-Oren* limited the realm of possibilities opened by *Filartiga*,<sup>86</sup> a few cases have attempted to bypass the FSIA's jurisdictional provisions by invoking the ATS in suits against a foreign sovereign state. The crucial issue in these cases and in *Amerada Hess* is whether the ATS grants jurisdiction in situations where the FSIA does not.

In *Siderman v. Republic of Argentina*,<sup>87</sup> the plaintiffs brought suit against Argentina for torture and the confis-

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<sup>81</sup> *Id.* at 777 (Edwards, J., concurring).

<sup>82</sup> *Id.* at 795-96, 798.

<sup>83</sup> *Id.* at 823-25 (Robb, J., concurring).

<sup>84</sup> *Id.* at 813-14 (Bork, J., concurring).

<sup>85</sup> *Id.* at 819.

<sup>86</sup> Note, 39 HASTINGS L.J., *supra* note 8, at 1115.

<sup>87</sup> No. CV 82-1772-RMT (Mcx), slip op. (C.D. Cal. filed Mar. 7, 1985).

cation of property by a past military government. The District Court for the Central District of California vacated an earlier default judgment against Argentina and dismissed the case on the ground that neither the ATS nor the FSIA provided any exception to Argentina's sovereign immunity protection. The court established that the doctrine of absolute immunity was generally recognized in 1789. If Congress intended to affect that immunity by enacting the ATS, Congress would have so stated in the statute. Since the ATS is silent in this respect, the court reasoned that the ATS did not provide an exemption for foreign sovereign immunity and therefore could not be a basis for asserting jurisdiction over a foreign state.<sup>88</sup> After concluding that the plaintiff's cause of action did not come under any exceptions in the FSIA, the court dismissed the case for want of jurisdiction.<sup>89</sup>

A similar result was reached in *In re Korean Air Lines Disaster of Sept. 1, 1983*,<sup>90</sup> in which wrongful death claims were brought against the Union of Soviet Socialist Republics (USSR) for deaths caused by the destruction of Korean Air Lines Flight 007. Plaintiffs asserted jurisdiction over the USSR under both the FSIA and ATS.<sup>91</sup> The district court dismissed the claims on the ground that none of the FSIA's immunity exceptions applied to the facts of the case.<sup>92</sup> Furthermore, the court also refused to sustain jurisdiction under the ATS as an alternative because "to hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act."<sup>93</sup> In summary, both *Siderman* and *Korean Air Lines* refused to apply the ATS in suits against foreign sovereign

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<sup>88</sup> *Id.* at 2-3.

<sup>89</sup> *Id.* at 3-4.

<sup>90</sup> Misc. No. 83-0345, slip op. (D.D.C. filed Aug. 2, 1985).

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 5-10, 15. The court rejected plaintiffs' implied waiver argument and further ruled that action by the Soviet military was neither a "commercial activity" nor a "commercial act" with "direct effects" in the United States under section 1605(a)(2). *Id.*

<sup>93</sup> *Id.* at 11. In addition to the discussion of the FSIA and the ATS, the district

states, instead jurisdiction analyses were done under the FSIA.

A contrary view, however, was expounded in *Von Dardel v. Union of Soviet Socialist Republics*.<sup>94</sup> In *Von Dardel* the plaintiffs sued the USSR for the arrest, detention and subsequent disappearance of a Swedish diplomat.<sup>95</sup> The district court of the District of Columbia first concluded that jurisdiction could be sustained under the FSIA. Relying on the language of the statute that immunity is "subject to international agreements," the court held that where provisions of the FSIA interfered with the operation of international agreements to which the United States was a party in 1976, FSIA must be pre-empted.<sup>96</sup> Since the court determined that the USSR had violated the 1961 Vienna Convention on Diplomatic Relations,<sup>97</sup> and the 1973 Convention on Internationally Protected Persons,<sup>98</sup> no immunity could be granted under FSIA.<sup>99</sup> Furthermore, the court also found that the USSR, by explicitly binding itself to international human rights agreements and treaties codifying diplomatic immunity, had implicitly waived its immunity under section 1605(a)(1) of FSIA.<sup>100</sup>

Turning to the ATS, the court held that jurisdiction could also be sustained because the USSR's treatment of the diplomat constituted a clear violation of international law under all three tests of *Tel-Oren*.<sup>101</sup> In the final analy-

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court ruled that the act of state doctrine precluded judicial interference in this case. *Id.* at 11-14.

<sup>94</sup> 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990) (applying the Supreme Court ruling in *Amerasia Hess*, the district court vacated its 1985 judgment because none of the FSIA exceptions to sovereign immunity applied in this case). The 1985 judgment is, however, still instrumental in depicting the development of the law before the Supreme Court decision in *Amerasia Hess*.

<sup>95</sup> *Id.* at 248-250.

<sup>96</sup> *Id.* at 254 (citing 28 U.S.C. § 1604).

<sup>97</sup> Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

<sup>98</sup> Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.

<sup>99</sup> *Von Dardel*, 623 F. Supp. at 255.

<sup>100</sup> *Id.* at 255-56.

<sup>101</sup> *Id.* at 257-59. Under Judge Edward's test, the court found that the arrest



sis, the *Von Dardel* court found that jurisdiction could be asserted under both the FSIA and the ATS in this case. In other words the FSIA does not preempt the ATS in a suit against a foreign sovereign.

After *Von Dardel*, there was an apparent split of opinion among the federal courts as to what should be the proper relation between the FSIA and the ATS. The district court in *Amerada Hess* adopted the approach of *Siderman* and *Korean Air Lines*, ruling that FSIA preempted the application of ATS in a suit against a foreign sovereign.<sup>102</sup> In contrast, the Second Circuit favored the expansive approach in *Filartiga* in interpreting the ATS and went even further than *Von Dardel*, holding that the ATS could grant jurisdiction over a foreign state even when the FSIA did not.<sup>103</sup> Against this divergent array of legal opinions, the United States Supreme Court granted certiorari in *Amerada Hess*.<sup>104</sup>

### III. THE SUPREME COURT DECISION

The Supreme Court, in a unanimous decision, reversed the Second Circuit and held in *Argentine Republic v. Amerada Hess Shipping Corp.*<sup>105</sup> that the FSIA preempted the application of the ATS in suits against foreign states. The Court first emphasized that subject matter jurisdiction of lower federal courts was determined by Congress through statutory grant.<sup>106</sup> The Court then discussed the overall framework of the FSIA and concluded that the "text and structure of the FSIA demonstrate Congress' intention

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and detention of a diplomat was a clear violation of a principle of international law on which the community of nations had reached a consensus. Since interference with a diplomat's right was recognized as a violation of the law of nations in 1789, Judge Bork's test was also satisfied. Finally, the court concluded that jurisdiction could be upheld under Judge Robb's test, as diplomatic rights are so widely accepted that allowing litigation in the United States courts to vindicate such rights would not cause any embarrassment to the United States. *Id.*

<sup>102</sup> *Amerada Hess*, 638 F. Supp. at 76-77.

<sup>103</sup> *Amerada Hess*, 830 F.2d at 428-29.

<sup>104</sup> 485 U.S. 1005 (1988).

<sup>105</sup> 488 U.S. 428 (1989).

<sup>106</sup> *Id.* at 433.

that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”<sup>107</sup> The Court reiterated its own opinion in *Verlinden B.V. v. Central Bank of Nigeria*<sup>108</sup> that subject matter jurisdiction of the district courts in any action against a foreign sovereign depended on the existence of one of the specific exceptions under the FSIA.<sup>109</sup>

The Supreme Court next identified the two major arguments of the Second Circuit: (1) granting immunity to Argentina would be contrary to Congress’ intention that FSIA be interpreted according to international law of sovereign immunity;<sup>110</sup> and (2) the FSIA’s focus on commercial concerns and Congress’ failure to repeal the ATS indicated Congress’ intention to allow federal courts to continue exercising jurisdiction over foreign states outside the limits of the FSIA, especially in actions involving a violation of international law.<sup>111</sup>

Rebutting the first argument, Chief Justice Rehnquist observed that Congress relied on its article I<sup>112</sup> power to define and punish “offenses against the Law of Nations” when it enacted the FSIA.<sup>113</sup> Moreover, the FSIA contained a specific exception based on violation of international law.<sup>114</sup> From these observations, the Court concluded that Congress did consider the violation of international law in the legislative process and consciously decided that immunity is available in those cases involving alleged violations of international law that fall outside the FSIA’s exceptions.<sup>115</sup>

In response to the appellate court’s second argument, the Court pointed out that there were various reasons why

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<sup>107</sup> *Id.* at 434.

<sup>108</sup> 461 U.S. 480 (1983).

<sup>109</sup> *Id.* at 493; *Amerada Hess*, 488 U.S. at 435.

<sup>110</sup> *Amerada Hess*, 488 U.S. at 435.

<sup>111</sup> *Id.*

<sup>112</sup> U.S. CONST. art. I, § 8.

<sup>113</sup> HOUSE REPORT, *supra* note 39, at 6611.

<sup>114</sup> 28 U.S.C. § 1605(a)(3) (foreign sovereign immunity will be denied in suits where rights in property are taken in violation of international law).

<sup>115</sup> *Amerada Hess*, 488 U.S. at 435-36.

Congress failed to repeal or amend the ATS. The inaction could be explained by the "lack of certainty as to whether the Alien Tort Statute conferred jurisdiction in suits against foreign states."<sup>116</sup> The Court noted that since the ATS was enacted in 1789, only one United States court had exercised jurisdiction over a foreign sovereign under the statute.<sup>117</sup> Furthermore, in view of the comprehensive scope of the FSIA, the legislative history,<sup>118</sup> and the statutory language<sup>119</sup> pertaining to the preemptive nature of the statute, the Court found that not "even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute . . . ."<sup>120</sup> Finally, the Court held that it was not necessary for Congress to amend or repeal the ATS when enacting the FSIA because the two statutes did not supplement one another, nor was it a situation where a more general statute impliedly repealed an earlier statute with a narrower subject.<sup>121</sup> After rebuffing the Second Circuit's arguments, the Court concluded that the "FSIA provides the sole basis for asserting jurisdiction over a foreign state in federal court."<sup>122</sup>

The Court then turned to examine the arguments raised by the respondents. Chief Justice Rehnquist re-

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<sup>116</sup> *Id.* at 436.

<sup>117</sup> *Id.* The Court referred to *Von Dardel v. Union of Soviet Social Republics*, 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990). See *supra* notes 94-101 and accompanying text for a discussion of this case.

<sup>118</sup> *Amerada Hess*, 488 U.S. at 438. The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states . . . . It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns . . . ." HOUSE REPORT, *supra* note 38, at 6610.

<sup>119</sup> *Amerada Hess*, 488 U.S. at 437. Section 1602 of the FSIA provides that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter." *Id.* (emphasis added by the Supreme Court).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 438.

<sup>122</sup> *Id.* The Court held that the all-encompassing nature of the FSIA and the express provision of section 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607," necessarily precluded the application of the ATS in this case. *Id.*

jected the assertion that, in addition to the FSIA, the general admiralty and maritime jurisdiction provision under section 1333(1)<sup>123</sup> provided the courts with jurisdiction in cases concerning violations of international law. The Court ruled that unless the present case was within section 1605(b), which expressly permits *in personam* suits in admiralty against a foreign state,<sup>124</sup> or another exception to the FSIA, section 1333(1) did not authorize the claim against the petitioner.<sup>125</sup>

As to the question of whether any of the exceptions enumerated in the FSIA applied to the case at bar, the respondents argued that the noncommercial torts exception under section 1605(a)(5)<sup>126</sup> was most on point. Noting that section 1605(a)(5) applies only to cases in which damage to property occurred in the United States, the Court held that the exception was inapplicable because the bombing of the *Hercules* happened far outside the three-mile limit of the United States territorial waters.<sup>127</sup>

Based on the fact that the FSIA was enacted “[s]ubject to international agreements to which the United States is

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<sup>123</sup> 28 U.S.C. § 1333(1) (1988). The section provides that “the district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” *Id.*

<sup>124</sup> 28 U.S.C. § 1605(b). Subject to certain conditions, the section provides that:

A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state which maritime lien is based upon a commercial activity of the foreign state.

*Id.*

<sup>125</sup> *Amerada Hess*, 488 U.S. at 438-39.

<sup>126</sup> 28 U.S.C. § 1605(a)(5). The section provides that a foreign state shall not be immune from jurisdiction of United States courts in any case:

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

*Id.*

<sup>127</sup> *Amerada Hess*, 488 U.S. at 439-41.

a party at the time of the enactment,"<sup>128</sup> the respondents claimed that the Geneva Convention on the High Sea<sup>129</sup> and the Pan American Maritime Neutrality Convention,<sup>130</sup> to which both the United States and Argentina are parties, created an exception to the FSIA. The Court disagreed with their reasoning, noting that these conventions provided for rules of conduct and compensation, but did not create a private right of action for recovery against foreign states.<sup>131</sup> Moreover, the Court held that a foreign state could not waive its immunity under section 1605(a)(1) of the FSIA simply by signing an international agreement without an explicit provision waiving immunity to suits in United States courts.<sup>132</sup> Next, the respondents contended that the Treaty of Friendship, Commerce and Navigation between the United States and Liberia<sup>133</sup> carved out an exception to the FSIA. While agreeing that the treaty provides Liberian nationals freedom of access to United States courts, Chief Justice Rehnquist pointed out that the provision allowed access to these courts only in conformity with the system of local laws which included the FSIA.<sup>134</sup>

Finally, the Supreme Court unequivocally held that FSIA provides the sole basis for asserting jurisdiction over a foreign state in United States courts. Since none of the exceptions under FSIA applied to the case at bar, the judgment of the court of appeals was reversed.<sup>135</sup>

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<sup>128</sup> 28 U.S.C. § 1604.

<sup>129</sup> Law of the Sea Convention on the High Sea, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

<sup>130</sup> Pan American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, 1990-91, T.S. No. 845.

<sup>131</sup> *Amerada Hess*, 488 U.S. at 442.

<sup>132</sup> *Id.*

<sup>133</sup> Treaty of Friendship, Commerce, and Navigation between United States of America and Liberia, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T.S. No. 956.

<sup>134</sup> *Amerada Hess*, 488 U.S. at 443.

<sup>135</sup> *Id.* Justice Blackmun and Justice Marshall filed a joint concurring opinion. Both Justices agreed with the majority's determination with regard to the preemptive nature of FSIA, but opined that since the court of appeals had not decided the

## IV. PRACTICAL IMPLICATIONS

The Supreme Court decision clarifies one unsettled area of foreign sovereign immunity jurisprudence by delineating the relationship between the FSIA and the ATS. Officially recognizing the preemptive nature of the FSIA, the Court has effectively precluded any future attempts to assert jurisdiction over a foreign state outside the parameters of the FSIA.<sup>136</sup> The decision introduces a measure of certainty in future litigation involving foreign sovereigns because parties will henceforth be able to rely on the FSIA as the exclusive basis for obtaining jurisdiction.

The Court's analysis of the exceptions under the FSIA is far from expansive. With regard to the noncommercial torts exception, the Court construed the term "occurring in the United States"<sup>137</sup> as describing the area within the three-mile territorial waters limit,<sup>138</sup> thereby excluding the applicability of the exception to injury occurring on the high seas. In addition, the Court narrowly interpreted existing international agreements for finding an exception to immunity under the FSIA. To invoke the section 1604 international agreement exception or waiver under section 1605(a)(1), an international convention must either create a private right of action against foreign states or contain an explicit provision of waiver of immunity to suit in United States courts.<sup>139</sup>

Chief Justice Rehnquist's opinion also impacts the applicability of the ATS. By asserting the preemptive nature of FSIA, the Court narrowed the class of potential defendants that can be sued under the ATS. After *Amerada Hess*, plaintiffs injured abroad by a foreign state's tortious ac-

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question of whether the FSIA's exceptions were applicable to the present claim, the case should be remanded. *Id.* at 443-44.

<sup>136</sup> Note, 77 CALIF. L. REV., *supra* note 8, at 376.

<sup>137</sup> See U.S.C. § 1605(a)(5); see also *supra* notes 126-27 and accompanying text.

<sup>138</sup> The President of the United States announced the recognition of a territorial waters limit of 12 nautical miles on December 28, 1988. See *Amerada Hess*, 488 U.S. at 441 n.8 (quoting Proclamation No. 5928, 54 Fed. Reg. 777 (1989)).

<sup>139</sup> For a discussion of the waiver provisions, see *supra* notes 128-34 and accompanying text.

tions cannot bring suits in the United States under the FSIA, nor can they bring actions under the ATS. The decision seems to reflect a reluctance to expand the judiciary's role in vindicating international human rights, at least in a situation where a foreign state is a defendant. By stating that the ATS "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states,"<sup>140</sup> however, the Court left intact a recent series of international human rights cases which used the ATS as a jurisdictional basis for tort actions against foreign public officials.<sup>141</sup> Although *Amerada Hess* clarifies the applicability of ATS in foreign sovereign immunity cases, it does not give any definitive answers to the questions of when and by whom jurisdiction can be invoked under the ATS. Until the Supreme Court or Congress speaks again on the ATS, the lower courts will have to continue to explore the uncertain field of the statute on their own.

## V. CONCLUSION

The diverging views of the court of appeals and the Supreme Court in *Amerada Hess* underscore the tension between the protection of individual rights and the doctrine of foreign sovereign immunity.<sup>142</sup> While the Second Circuit's attempt to defend individual property rights by denying immunity to a foreign state acting in violation of international law is laudable, the court's reasoning is legally unsound.<sup>143</sup> The Supreme Court is undoubtedly correct in holding that the FSIA provides the exclusive basis for asserting jurisdiction over foreign states. The legislative history, statutory language, and structure of the FSIA bear out this conclusion.

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<sup>140</sup> *Amerada Hess*, 488 U.S. at 438.

<sup>141</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); see also *supra* notes 71-85 and accompanying text.

<sup>142</sup> See Note, 77 CALIF. L. REV., *supra* note 8, at 376.

<sup>143</sup> For criticisms of the Second Circuit decision, see *supra* note 8.

Although the *Amerada Hess* decision does not provide satisfactory answers to all the questions pertaining to the applicability of the FSIA and ATS, it does successfully accomplish one fundamental goal of Congress in enacting the FSIA: to achieve uniformity in foreign sovereign immunity determinations.

*Pik-Kwan Ho*





# **Current Literature**

